United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7105

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 77-7105

- x

OSCAR ROBERTSON, et al., :

Plaintiffs, :

- against - :

NATIONAL BASKETBALL ASSOCIATION, et al., :

Defendants. :

- x

AMERICAN BASKETBALL ASSOCIATION, et al., :

Cross-Claimants, :

- against - :

NATIONAL BASKETBALL ASSOCIATION, et al., :

Cross-Defendants. :

- x

R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars, :

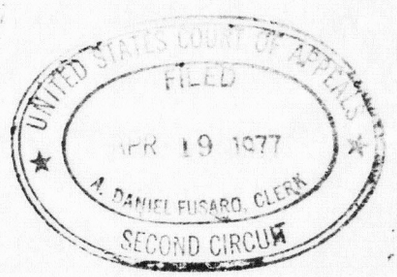
Cross-Claimant-Appellant, :

- against - :

FREDERICK P. FURTH, :

Appellee. :

- x



On Appeal From The United States District Court
For The Southern District Of New York

REPLY BRIEF FOR CROSS-CLAIMANT-APPELLANT

WATSON LEAVENWORTH KELTON & TAGGART
Special Counsel Appearing for
Cross-Claimant-Appellant
100 Park Avenue
New York, New York 10017
(212) 683-4221

OF COUNSEL:

Thomas V. Heyman
Maxim H. Waldbaum
100 Park Avenue
New York, New York 10017

Robert G. Pierce
Butler, Landrum, Pierce and Turner
720 Kipling, Suite 201
Lakewood, Colorado 80215

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
POINT I.	
THE ORDER OF THE COURT BELOW IS A FINAL APPEALABLE ORDER	6
POINT II.	
INTERVENORS' CLAIMS OF COLLATERAL ESTOPPEL ARE WITHOUT MERIT	9
POINT III.	
THIS COURT'S STANDARD OF REVIEW IS NOT LIMITED BY ANY FINDINGS BELOW	15
POINT IV.	
NEITHER THE ANSWERING BRIEF OF FURTH NOR THE BRIEF OF INTERVENORS ESTABLISH THE EXISTENCE OF A CONFLICT PERMITTING WITHDRAWAL OF FURTH	17
A. The Financial Liability Of Intervenors Created By Their Execution Of An Indemnification Agreement Or Joint Venture Agreement Does Not Establish An Attorney's Conflict Of Interest Barring Furth's Continued Representation Of The Utah Stars	17
B. None Of The Authorities Relied Upon By Furth Or Intervenors Establish A Conflict Of Interest Because Of Furth's Continued Representation Of The Utah Stars	22
CONCLUSION	31

AUTHORITIES CITED

Page

American Roller Company v. Budinger, 513 F.2d 982 (3d Cir. 1975)..... 16

Arden v. State Bar of California, 52 C.2d 310, 341 P.2d 6 (Sup.Ct. of Calif. 1959)..... 28

Bono v. United States, 113 F.2d 724 (2d Cir. 1940)..... 10

In Re Boone, 83 Fed. 944 (N.D. Cal. 1897)..... 24

Brown v. Miller, 286 F. 994 (D.C. Cir. 1923)..... 25

Caplan v. Caplan, 268 N.Y. 445 (1935)..... 18

Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954)..... 25

G.C. Croce v. The Superior Court of the City and County of San Francisco, 21 Cal. App.2d 18, 68 P.2d 369 (1st District Court of Appeals 1937)..... 28

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 526 (2d Cir. 1973)..... 26

J.P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975)..... 30

Page

Fortunato v. Ford Motor Company, 464 F.2d 962 (2d Cir. 1972)..... 10

Gerdes v. Reynolds, 28 N.Y.S.2d 622 (S. Ct. N.Y. Cty. 1941)..... 18

W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976)..... 8, 9, 30

Hormel v. Helvering, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941)..... 10

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975)..... 27, 28

E.F. Hutton & Company v. Brown, 305 F. Supp. 371 (S.D. Texas 1969)... ..... 28, 29, 30

International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975)..... 8

Ishmael v. Millington, 241 C.A.2d 520 (1966)..... 23

Koehring Co. v. Manitowoc Co., 418 F. Supp. 1133 (E.D. Wisc. 1976)..... 26

Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976)..... 16

Kroungold v. Triester, 521 F.2d 763 (3d Cir. 1975)..... 16

Marketti v. Fitzsimmons, 373 F. Supp. 637 (W.D. Wisc. 1974)..... 26, 27

Page

E.H. McDonnell v. American Leduc Petroleums, Ltd., 456 F.2d 1170 (2d Cir. 1972)..... 18

NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976)..... 27

Nichols v. Elkins, 408 P.2d 34, 2 Ariz. App. 272 (Ct. of Appeals of Arizona 1966)..... 28

Petty v. Superior Court, 116 App. Cal. 2d 20, 253 P.2d 28 (2d District Court of Appeals 1953)..... 28

Porter v. Huber, 68 F. Supp. 132 (W.D. Wash. 1946)..... 25

Sabin v. Home Owners' Loan Corporation, 151 F.2d 541 (10th Cir. 1945)..... 12

Sheffield v. State Bar, 22 C.2d 627 (1943)..... 24

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. en banc 1974)..... 7, 8

T.C. & Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953)..... 25, 26

Terkildsen v. Waters, 481 F.2d 201 (2d Cir. 1973)..... 10

Page

Wilkerson v. Meskill, 501 F.2d 297 (2d Cir. 1974)..... 10

Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976)..... 6, 16, 30

Wutchumna Water Co. v. Bailey, 216 Cal. 569 (1932)..... 23

STATUTES

28 U.S.C. §1291..... 6

MISCELLANEOUS

Restatement (2d) of Judgments (Tent. Draft. No. 1), Section 68..... 12

Restatement (2d) of Judgments (Tent. Draft. No. 1), Section 68.1..... 13, 14

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 77-7105

- x

OSCAR ROBERTSON, et al.,

Plaintiffs,

- against -

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants.

- x

AMERICAN BASKETBALL ASSOCIATION, et al.,

Cross-Claimants,

- against -

NATIONAL BASKETBALL ASSOCIATION, et al.,

Cross-Defendants.

- x

R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars,

Cross-Claimant-Appellant,

- against -

FREDERICK P. FURTH,

Appellee.

- x

On Appeal From The United States District Court
For The Southern District Of New York

REPLY BRIEF FOR CROSS-CLAIMANT-APPELLANT

PRELIMINARY STATEMENT

This brief is in reply to the separate answering briefs filed by Frederick P. Furth (hereinafter "Furth"), the settling American Basketball Association (hereinafter

"ABA") expansion teams who are Intervenor-Appellees herein (hereinafter the "Intervenors"), and the National Basketball Association (hereinafter "NBA"), respectively.

At the outset of his answering brief (p. 2) Furth makes clear that he does not take sides in this matter stating, "we cannot elect one side over the other". Thus, if this Court reverses the Order of the court below because there is no conflict barring Furth's continued representation of the cross-claimant-appellant Utah Stars, Furth must and will continue such representation.

Further, the affidavits of fact filed in connection with Furth's application to withdraw, namely, the affidavits of Furth and Robert S. Carlson, counsel for the Intervenor ABA expansion teams (hereinafter "Carlson"), establish that the motivating force in Furth making his application was a direction from Carlson to Furth. Carlson has sworn and Furth agrees that following Carlson's arranging a settlement on behalf of the ABA expansion teams with the NBA, he "instructed Mr. Furth on behalf of my clients to take no further action", that "by the settlement" there "was created" a "conflict" and that "Mr. Furth could no longer represent plaintiffs in this action nor any of the cross-claimants in Robertson" (A17, 117). Thus, the sole motivation for Furth's filing the motion to withdraw was the direction from Carlson to Furth that he could no longer

represent cross-claimants in Robertson, including the Utah Stars, because Carlson had effectuated a settlement that created an alleged conflict. This position was asserted by Carlson notwithstanding the fact that Furth was not permitted to participate in the meetings leading to the settlement which created the alleged conflict. Thus, not only were the Utah Stars not represented by their counsel Furth in the settlement negotiations, they are being stripped of their counsel because of such settlement. The manifest injustice in such a proposition requires redress by this Court.

The NBA's answering brief is simply an apologia for the terms of its settlement agreement with the ABA expansion team Intervenors. It does not deny that its settlement agreement and specifically the indemnity agreement extracted from the Intervenor ABA expansion teams as a condition of settlement is the putative basis for the alleged conflict which provides the "excuse" for Carlson's direction to Furth to withdraw. It simply pleads that it had no intent to cause Furth's withdrawal. Whatever the intent of the NBA, the terms of the settlement agreement which it demanded from the ABA expansion teams for merger are the alleged basis for Furth's withdrawal now presented to this Court for review.

The settlement agreement between the ABA expansion

teams and the NBA cannot be allowed to provide a basis for Furth being restricted from continuing as counsel for the Utah Stars for if such is found to be the effect of the indemnity agreement between the ABA and NBA teams (a copy of which is filed herewith as Exhibit A), to that extent such indemnity agreement is improper as against public policy for the reasons set forth at length in Cross-Claimant-Appellant Utah Stars' opening brief, pp. 17-20. None of the appellees attempt to refute the propositions therein set forth, for the settlement agreement now being used improperly to restrict Furth from continuing to represent the Utah Stars has the same force and effect as if a covenant restricting his representation had been expressly written into the settlement.

Further, nowhere in the answering briefs of appellees is there any response to the clear effect of the Order of the court below, namely, to strip a bankrupt client of its counsel in a heavily pretried case on the eve of trial. It is unrefuted that the Intervenor ABA expansion teams in the spring of 1976 (just prior to the eve of trial, June 1, 1976) rejected Furth, the counsel they had shared in common with the Utah Stars for many years, and retained Carlson, attorney for the New York Nets and former Commissioner of the ABA, to approach the NBA. The Intervenors entered into a settlement agreement in which they agreed to

indemnify the NBA for any damages which might be incurred by the NBA as a result of the action in which they participated with the Utah Stars. The Utah Stars were not represented in those negotiations and, in fact, their counsel, Furth, who had been counsel for the ABA expansion teams, was expressly excluded. Now the ABA Intervenors having made their peace with the NBA to the exclusion of the Utah Stars have the audacity to support the Order of the court below stripping the Utah Stars of their counsel. An affirmance of the court below would be a gross miscarriage of justice. The Order permits Furth to violate his professional obligations to the Utah Stars, contrary to the Code of Professional Responsibility, permits him to breach his agreement of professional services with the Utah Stars and, in permitting his withdrawal because of the indemnity agreement, restricts the Utah Stars' right to his counsel in violation of public policy and the Code of Professional Responsibility.

Since the Intervenors have shown themselves on this appeal to be in fact the real parties in interest urging this Court to affirm the Order below permitting Furth's withdrawal, we deal principally with their answering brief and additionally respond to any matters raised by Furth which do not parallel those raised by the Intervenors.

POINT I.

THE ORDER OF THE COURT BELOW IS A FINAL APPEALABLE ORDER

The lack of credibility in the various positions of the Intervenors is highlighted by their first proposition, namely, that the Order of Judge Carter is not an appealable order. The law in this Circuit and elsewhere is clear that the matter of a removal of counsel for any reason is a final and appealable order within the ambit of 28 U.S.C. §1291. The Intervenor ABA expansion teams are unable to point to a single authority which draws a distinction between a motion to withdraw and a motion to disqualify as respects the finality of the order in connection with such motions. In Woods v. Covington County Bank, 537 F.2d 804, 809 (5th Cir. 1976), the Court stated:

> "Inasmuch as it is well established that a District Court's order granting or denying a motion to disqualify an attorney appearing before it is a 'final order' appealable pursuant to 28 U.S.C. § 1291, we properly have jurisdiction in this case. In re Yarn Processing Patent Validity Litigation, 5 Cir., 1976, 530 F.2d 83, 85; United States v. Garcia, 5 Cir., 1975, 517 F.2d 272, 275; Tomlinson v. Florida Iron & Metal, Inc., 5 Cir., 1961, 291 F.2d 333, 334; see Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 2 Cir., 1974, 496 F.2d 800 (en banc)".

In arriving at this decision, the Fifth Circuit relied upon

this Court's decision in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800, 805 (2d Cir. en banc 1974). In Silver Chrysler this Court established once and for all the law in this Circuit that orders involving the disqualification of counsel were final, from which a direct appeal could be taken. In fact, in Silver Chrysler the Court was settling the only question which remained, namely, whether if a court below failed to disqualify a counsel (or failed to permit withdrawal), was such an order appealable or a matter to be resolved only after trial. The Court stated (at p. 805):

> "Now in 1974 we believe that Cohen requires a return to the wisdom of Harmar and so we uphold the appealability of an order denying disqualification, just as we have long upheld the appealability of an order granting this. There is no sufficient basis for distinguishing between the two. In both situations the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." (emphasis supplied)

The reasoning of this Court sitting en banc in 1974 applies equally to the matter here before it. The grave consequences to the Utah Stars of their being stripped of counsel at this point in these proceedings is unquestioned and in the words of this Court it is "fatuous" for the Intervenor ABA expansion teams to suggest that the

matter of Furth's withdrawal is not ripe for review by this Court at this time. Silver Chrysler was followed in International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1289 footnote 1, (2d Cir. 1975), cited in Intervenors' brief, p. 18.

None of the authorities cited by Intervenor ABA expansion teams at pp. 14 through 20 of their brief provide any basis for their suggestion that the Order of the court below granting Furth's motion to withdraw is not appealable. In fact, they not only provide no support for that proposition, but would appear to set forth principles which strongly suggest that this Court should reverse the Order of the court below. For example, in W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (cited at p. 19 of Intervenors' brief), this Court, in affirming the denial of a motion to disqualify, stated:

> "As Judge Clark suggested in Fisher and as we have recently noted in Lefrak, we cannot lightly separate Grant from the counsel of its choice. Counsel here has been engaged for well over a year in the investigation and preparation of this lawsuit. Disqualification of present counsel and the substitution of a new attorney unfamiliar with the facts and the law will inevitably result in further harmful delay and expense to Grant."*

---

* We would ask the Court to take judicial notice of the fact that W.T. Grant was insolvent in 1976.

Counsel Furth has been involved in investigation and pursuit of the claims against the NBA on behalf of the Utah Stars for a period far longer than counsel in the Grant case and has knowledge of an extraordinarily voluminous record, the extent of which is noted in the Utah Stars' opening brief at p. 4.

Finally, contrary to Intervenors' contention, not only is there no distinction in the authorities between a court granting a motion to withdraw and a motion to disqualify, but on the undisputed facts of this case it is clear that Carlson, on behalf of the Intervenors, had advised Furth that he was disqualified as of the summer of 1976 (A17, 117), following and as a result of the settlement created through the efforts of Carlson representing the Intervenors. Thus, had Furth not filed a motion to withdraw he would have been faced with a motion to disqualify by Carlson* for the Intervenors.

POINT II.

INTERVENORS' CLAIMS OF COLLATERAL ESTOPPEL ARE WITHOUT MERIT

In a highly technical argument which ignores critical facts in this case, Intervenors contend, for the

---

* The ends to which the Intervenor ABA expansion teams have gone to thwart the ability of the Utah Stars to pursue their claim against the NBA is highlighted by their attempt to block the Utah Stars even from inspection of Furth's files. See footnote, p. 17 of Intervenors' brief.

first time* in this proceeding, that the Order of Judge Zirpoli (A99-101) granting Furth's withdrawal as counsel for the Utah Stars in a related proceeding in the Northern District of California bars the Utah Stars from opposing Furth's motion to withdraw herein on the grounds of collateral estoppel. The San Francisco action referred to by Intervenors was an action which was enjoined by Judge Carter (Intervenors' brief, p. 5).

The facts are that following the settlement effectuated by Carlson on behalf of the ABA expansion teams, the NBA moved to dismiss an action by the ABA against the

---

* Issues not raised below are foreclosed from appellate consideration. It is the:

> "general rule of practice which forecloses appellate consideration of issues not raised below. See, e.g., Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). Adherence to the rule is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised ****Accordingly, we decline to consider an issue so belatedly raised." Terkildsen v. Waters, 481 F. 2d 201, 204-205 (2d Cir. 1973).

See also, Wilkerson v. Meskill, 501 F.2d 297, 298 (2d Cir. 1974); Bono v. United States, 113 F.2d 724, 725 (2d Cir. 1940); Fortunato v. Ford Motor Company, 464 F.2d 962, 967, 969 (2d Cir. 1972). In both the brief of the Intervenor ABA expansion teams and the NBA, there are repeated references to items which are not part of the record on this appeal, e.g., p. 4 footnote; p. 5 first footnote; p. 9 footnote; pp. 14 and 23 of Intervenors' brief and footnote p. 3 of NBA brief.

NBA in the Northern District of California wherein the allegations were identical with the cross-claims herein. That case had been dormant for years as a result of Judge Carter's enjoining proceedings therein (Intervenors' brief, p. 5).* In connection with that motion to dismiss, Furth made an oral application to withdraw which was granted by Judge Zirpoli. Furth filed no papers in connection with that withdrawal application as he did in the matter before Judge Carter. Judge Zirpoli did not have before him any of the authorities which were presented by Cross-Claimant-Appellant Utah Stars to Judge Carter. The matter before Judge Zirpoli cannot be said to have been fully litigated as it occurred in an action that had been expressly enjoined by Judge Carter and so far as the effect of any action therein, it was by virtue of Judge Carter's injunction, a nullity. The most that can be said is that Judge Zirpoli as a matter of housekeeping dismissed the long dormant antitrust case without prejudice to it being refiled. His decision with

---

* Judge Carter throughout the pendency of this case has entered orders repeatedly enjoining related actions in other districts raising issues presently before him. See, e.g., Exhibits I and N to the affidavit of Michael A. Cardozo in Support of Application for Temporary Restraining Order and Preliminary Injunction filed January 6, 1977 and Judge Carter's Order of March 7, 1977 enjoining related actions by the Virginia Squires and New Orleans Buccaneers, a copy of which is filed herewith as Exhibit B to the Reply Brief for Cross-Claimant-Appellant Utah Stars.

respect to the propriety of Furth's withdrawal could not have been binding upon Judge Carter, the Utah Stars or this Court in reviewing Judge Carter's decision since Judge Carter had much earlier enjoined such action.

None of the cases cited by Intervenors in their brief at pp. 21 through 27 are apposite. Certainly, none of them involve a proceeding in an enjoined case as providing a basis for collateral estoppel in the principal case. For the most part they refer to decisions that were res judicata on the merits which foreclosed a second attempt at resolution of the merits on the same matter. In fact, Intervenors cite Sabin v. Home Owners' Loan Corporation, 151 F.2d 541 (10th Cir. 1945) as being "[d]irectly on point" (Intervenors' brief, p. 26), when, in fact, an examination of that case shows that the second (federal) court, in the same district where a prior state court action had taken place, reviewed the disqualification of a trial judge which had been fully litigated in such prior state court action. Notwithstanding the full review of disqualification of the judge in the state court action, the Tenth Circuit reviewed the question of disqualification anyway and found there was no substantial question on the facts as presented (151 F.2d at 542).

With a wont to cite authorities that are inapposite, Intervenors rely upon Section 68 of the Restatement

(2d) of Judgments (Tent. Draft No. 1) for their collateral estoppel argument (Intervenors' brief, p. 23), but fail to call to the Court's attention Section 68.1 which involves exceptions to the general rule of issue preclusion by collateral estoppel. Section 68.1 in relevant part states:

> "§ 68.1 Exceptions to the General Rule of Issue Preclusion.
>
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action; or
>
> * * *
>
> (c) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> * * *
>
> (e) There is a clear and convincing need for a new determination of the issue...(iii) because the party sought to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive

to obtain a full and fair adjudication in the initial action."

Following 68.1(a), it is quite clear that having been enjoined from taking any steps in the action in the Northern District of California, there was no mechanism for seeking review of Judge Zirpoli's erroneous ruling without making application to Judge Carter. Further, following §68.1(c) there is quite a difference in the extensiveness of the procedures involving the question of the propriety of Furth's withdrawal as they were treated by counsel in the instant action and the Northern District of California. The matter was not even briefed by Furth in the Northern District of California. As noted in Section 68.1(e)(iii), it is also clear that there was no adequate opportunity or incentive to obtain a clear adjudication in the Northern District of California since the only action which counted as a result of Judge Carter enjoining the Northern District of California action was the action below.

Intervenors contend that collateral estoppel is no mere technicality but a measure to save courts from the waste and burden of relitigating old issues (Intervenors' brief, p. 26). As noted above, Intervenors did not raise below, nor did Furth, the issue of collateral estoppel. Raising it at this time is clearly improper, supra, p. 10, and what is more, as shown above the principle of collateral

estoppel cannot apply to the instant case. Further, what is significant is the waste and burden to the Utah Stars if this Court affirms the Order below thereby causing them to seek new counsel in this complex case which was originally set for trial June 1, 1976. Such new counsel will have to fully acquaint himself with over 45,000 pages of pretrial testimony and voluminous interrogatories and documents in order to bring this matter to trial, at a cost that has been estimated to exceed $200,000 (A152).

POINT III.

THIS COURT'S STANDARD OF REVIEW IS NOT LIMITED BY ANY FINDINGS BELOW

Intervenors argue that because certain cases in this district and other districts have noted that the decision of a district court in disqualification matters is an exercise of discretion, this Court may not reverse unless there has been an abuse of such discretion. In the instant case Judge Carter did not file findings of fact and conclusions of law and thus Cross-Claimant-Appellant Utah Stars and this Court have no guidance as to what standard Judge Carter applied in "so ordering" Furth's motion to withdraw (A164). Even though some cases do indicate (Intervenors' brief, pp. 28-31) that the standard for review is whether the lower court has abused its discretion in discharging

Furth from his duties, it is quite clear that this Court on this appeal must write on a clean slate as a result of Judge Carter's failure to provide any findings. There can be no determination of whether there has been an abuse of discretion where the lower court failed to set forth the basis for its exercise of discretion. Further, a number of recent cases have indicated that where, as here, the facts are undisputed, the issue presented for review is a purely legal one and full review by this Court is appropriate. See, Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088 (3d Cir. 1976); Kroungold v. Triester, 521 F.2d 763, 765 (3d Cir. 1975); Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976); American Roller Company v. Budinger, 513 F.2d 982, 985 (3d Cir. 1975). In Woods v. Covington County Bank, supra at 810, the Court found:

> "In disqualification cases such as this, where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms. Thus, in this circuit we... carefully examin[e] a District Judge's application of relevant ethical standards [citing cases]."

In their brief at pages 29-31, Intervenor ABA expansion teams have the effrontery to argue that if the Court were to reverse Judge Carter, it would be compelling Furth to perform a "personal services contract against his

will". Furth has made it clear that in this matter he "cannot elect one side over the other" (Furth brief, p. 2). Furth does not anywhere in his papers suggest that if this Court should reverse Judge Carter, finding no conflict to exist, that he will be unable to serve or unwilling to serve and, in fact, he is obliged to continue to serve in order to fulfill his obligation to the Utah Stars in accordance with the Code of Professional Responsibility (see Cross-Claimant-Appellant's opening brief, pp. 7-14).

POINT IV.

NEITHER THE ANSWERING BRIEF OF FURTH NOR THE BRIEF OF INTERVENORS ESTABLISH THE EXISTENCE OF A CONFLICT PERMITTING WITHDRAWAL OF FURTH

A. The Financial Liability Of Intervenors Created By Their Execution Of An Indemnification Agreement Or Joint Venture Agreement Does Not Establish An Attorney's Conflict Of Interest Barring Furth's Continued Representation Of The Utah Stars

No case cited by Furth or the Intervenor ABA expansion teams involves a situation similar to that presently before the Court: certain of multiple parties [Intervenors] represented by a single counsel [Furth] have proceeded to take certain actions [indemnifying the NBA] without advice or consent of that counsel which may subject them to a financial liability which they did not have at the

time they retained such counsel and have sought to use such new or changed situation to bar counsel's continued representation of other of the multiple clients [the Utah Stars] who shared his representation with them. This is precisely what the Intervenor ABA expansion teams seek to do through the mechanism of their settlement with the NBA. It is not the joint venture agreement which creates the alleged barrier to Furth's continued representation because it is clear that new parties [the Intervenor ABA expansion teams] joining a joint venture [the NBA] cannot be held liable for illegal acts of the joint venture which took place before they joined the joint venture.* It is the indemnification agreement entered into by the ABA expansion teams, without the advice or counsel of Furth, which creates their financial

---

* The NBA joint venture agreement (A139-145) states that the purpose of the venture is to use "their best efforts" to see to it that the sport of professional basketball "is conducted according to the highest moral and ethical standards" (A140). Clearly, violation of the antitrust laws is not included in such purpose and the expansion teams cannot be liable for the NBA's past violations of the antitrust laws. New members of a joint venture cannot be liable for acts outside the scope or purpose of the joint venture and in violation of the antitrust laws without the NBA's reliance upon the indemnification agreement which it extracted as the price for settlement. (E.H. McDonnell v. American Leduc Petroleums, Ltd., 456 F.2d 1170, 1187 (2d Cir. 1972); Caplan v. Caplan, 268 N.Y. 445, 451 (1935); Gerdes v. Reynolds, 28 N.Y.S.2d 622, 646-647 (S. Ct. N.Y. Cty. 1941).)

liability* which they erroneously assert establishes a conflict of interest barring Furth's representation.

Let us consider anew the facts which give rise to the alleged conflict. In the spring of 1976, an economically troubled ABA with certain teams having gone into financial default (including the Utah Stars, a San Diego team, as well as the Virginia Squires), as a result of the illegal acts of the NBA, decided to enter into negotiations with the NBA. Did they seek to be represented in these

---

* Throughout Furth's brief and Intervenors' brief, there is a careful avoidance of any statement which highlights this effect of the indemnification agreement. They variously rely on the joint venture agreement or the subsequent suit filed by the Virginia Squires against the NBA and the ABA expansion teams to establish the existence of a conflict (Intervenors' brief, p. 9 and Furth's brief, p. 7). Yet, by virtue of the indemnity agreement the ABA expansion teams are liable whether or not named as parties in any action. Thus, it is the indemnity agreement and nothing else which provides the alleged basis for charging conflict of interest. For the record, contrary to the impression left by Intervenors' brief (pp. 9 and 12), the Utah Stars have never filed suit against the ABA expansion teams. In September, 1976, the Utah Stars commenced an action in Bankruptcy Court in Denver to prevent the payment of certain monies from the sale of players to the Spirits of St. Louis in fear that such monies, which the Utah Stars claim belong in large part to them, would be dissipated by the Spirits of St. Louis. That action asked for an injunction regarding the payment of those monies. A subsequent agreement was entered and a fund was created whereby counsel for the Spirits of St. Louis and the Utah Stars act as co-escrow agents to protect that fund pending resolution of the disputes between these two teams by an arbitrator. Since October, 1976, the complaint in that action referred to in Intervenors' brief at pp. 9, 12 and elsewhere, has been dismissed. Copies of the relevant papers are attached hereto as Exhibit C.

settlement negotiations by Furth? No! Why not? Because Furth represented all of the ABA teams other than the New York Nets, and would have been obliged to negotiate a settlement which would have provided some recovery or relief for all of the ABA teams. So, what did the Intervenor ABA expansion teams do? They went to Carlson, counsel for the Nets, and told him to deal with the NBA and not involve Furth because Furth would be obliged ethically, morally and professionally to negotiate a full and fair settlement for all of the teams he represented, including the Utah Stars. Carlson negotiated a settlement for the Intervenors to the exclusion of the Utah Stars. He negotiated a settlement which had an indemnification agreement (see Exhibit A filed herewith) which made the settling ABA expansion teams liable for any damages incurred as a result of the Utah Stars litigation. Now these ABA expansion teams having entered into such a settlement through new counsel, Carlson, without advice of old counsel, Furth, seek to have Furth withdraw from continued representation of the Utah Stars. If permitted to achieve this result, the indemnification agreement would be the same as a restrictive covenant barring counsel's representation of his other similarly situated clients, in violation of public policy and the Code of Professional Responsibility (see Cross-Claimant-Appellant Utah Stars' opening brief, pp. 17-20).

This case was originally scheduled to go to trial in June 1976. Had only one ABA team, for example the Utah Stars, negotiated a settlement with the NBA without aid of its counsel, Furth, which included an indemnity agreement whereby the Utah Stars would indemnify the NBA, it would be ridiculous to believe that Judge Carter would have granted the withdrawal of Furth or granted a motion by the Utah Stars to disqualify him, thereby precluding the speedy trial of the antitrust claims of the other ABA teams against the NBA and stripping them of counsel thoroughly familiar with the matter.* And yet, that is the result that the Intervenor ABA expansion teams seek to achieve here against the Utah Stars, stripping a bankrupt client of its counsel in a heavily pretried case which is ready to be tried.

Whether the NBA intended that effect or not, the purpose for which this indemnity agreement is being used in these proceedings by Intervenors and Furth is to provide an alleged basis for Furth's motion to withdraw. Such an agreement cannot be so used for to do so would permit there

---

* Curiously, had the New York Nets (always represented by Carlson), the only ABA team never represented by Furth, negotiated a settlement resulting in indemnification of the NBA, it could not bar Furth's continued representation of the Utah Stars. However, by getting three teams formerly represented by Furth to agree to be represented by Carlson in the negotiation of such a settlement, the New York Nets have been able by virtue of Judge Carter's Order to secure Furth's withdrawal. This highlights the error of the Order of the court below.

to be effectuated a restrictive covenant barring counsel Furth from continued representation of the Utah Stars. As so used, the indemnification agreement is violative of public policy and unenforceable just as would be an agreement of settlement which expressly provided that Frederick P. Furth was unable to continue representation of the Utah Stars (see Cross-Claimant-Appellant's opening brief, pp. 17-20).

B. None Of The Authorities Relied Upon By Furth Or Intervenors Establish A Conflict Of Interest Because Of Furth's Continued Representation Of The Utah Stars

In none of the cases cited by Furth or Intervenors involving a conflict of interest have the courts found a conflict to exist under the facts here undisputed, that is, where multiple parties having a common interest have retained counsel to pursue a litigation and certain of the parties have thereafter opted out of the litigation said counsel continues to represent the non-settling parties in the litigation. Rather, in each of the cases relied upon by Furth or Intervenors, the complained of activities of counsel involved instances where either clearly contradictory positions existed between the multiple parties at the time they retained counsel or involved instances where an attorney in a subsequent action attempted to represent

a party against a former client where the attorney had never represented both parties at the same time on the same side of the issue that the parties are now opposed.

The only authorities relied upon by Furth are set forth at pp. 14 and 15 of his answering brief. The first of these cases is Ishmael v. Millington, 241 C.A.2d 520 (1966), which involved an action for malpractice where an attorney who had previously represented the husband, represented both the husband and wife in an uncontested divorce proceeding and in the course thereof failed to properly inform the wife of the husband's financial status. It would be hard to find a case that was less apposite than Ishmael.

In Wutchumna Water Co. v. Bailey, 216 Cal. 569 (1932), the Court reversed denial of a motion to disqualify where an attorney had for years represented plaintiff in water rights litigations and thereafter agreed to represent other parties adverse to plaintiff in water rights litigations. This is a classic example of a party subsequently representing interests adverse to those of a former client. It has no application to the instant case where the Utah Stars and all other members of the ABA shared and pooled their common information respecting the illegal activities of the NBA and made them available in common to a single counsel. In Wutchumna counsel took an affirmative step to put himself at odds with his former client by agreeing to

retention in a subsequent litigation by parties having an interest adverse. In the instant case neither counsel Furth nor the Utah Stars have done anything which changes their position vis-a-vis the NBA which they shared with the other ABA teams at the time Furth was initially retained.

In Re Boone, 83 Fed. 944 (N.D. Cal. 1897), involved an application for disbarment which was granted because an attorney who had assisted in obtaining a decree in favor of his client establishing the validity of certain patents, thereafter wrote to the attorney of an adversary of his client in another suit involving the same patents, falsely stating that he possessed information that the decree was obtained by fraud and could be reversed. His sole purpose was to obtain employment and use the knowledge obtained from his former employment against his former client. Certainly, even Intervenors do not make any similar invidious assertion that Furth's continued representation in this case in any way parallels the activities of John L. Boone in In Re Boone.

In Sheffield v. State Bar, 22 C.2d 627 (1943), the Court suspended an attorney from practice for three months where after having been retained by his first client in connection with a dispute over premises and having obtained a restraining order against the defendant in that action, the attorney thereafter filed a complaint on behalf

of the defendant in the first action against his former client and sought damages for the breach of the same contract which was the subject of the prior action. Again, this cannot in any way be said to parallel the activities of Furth's continued representation of the Utah Stars.

In Brown v. Miller, 286 F. 994 (D.C. Cir. 1923), an attorney previously employed in the Office of the Alien Property Custodian, with full access to all documents in that office, and acting as attorney to the Custodian concerning a corporation's assets seized by the Custodian, thereafter represented another company who was attempting to obtain those same seized assets. In Porter v. Huber, 68 F. Supp. 132 (W.D. Wash. 1946), the facts parallel those of Brown v. Miller, except the attorneys were formerly employed in the Office of Price Administration and thereafter secured employment representing parties having an interest contrary to the Administrator in a matter which they had worked on or supervised during their time in the Administrator's Office.

The authorities cited by Intervenors at pp. 32-45 of their answering brief fare no better when analyzed in the light of the instant case. T.C. & Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953) and Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954), both involved

cases where an attorney who previously had defended motion picture distributors in government antitrust actions subsequently accepted a retainer from movie theatres in private antitrust treble damage actions against such distributors involving the same facts as in the prior government litigation.

In Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 526 (2d Cir. 1973), this Court affirmed disqualification of a counsel who was the "self-acknowledged architect" of six actions against a former client involving issues which had been critical to his prior representation of that client.

In Koehring Co. v. Manitowoc Co., 418 F. Supp. 1133 (E.D. Wisc. 1976), a law firm representing a party defending a patent infringement action had formerly represented the plaintiff in prior litigation relating to the validity of the same patents at issue in the second suit. Thus, the lawyer was in the position of asserting invalidity in a second suit on patents which he had in an earlier suit asserted were valid.

In Marketti v. Fitzsimmons, 373 F. Supp. 637 (W.D. Wisc. 1974), the attorney in question represented an international union for a number of years on a variety of matters. During that representation he was asked to assist a certain local union regarding strike actions taken by that

union and its members. Following the counselling of the local union with respect to those strikes and that representation having ended, he thereafter attempted to represent the international union against the local union with regard to the setting up of a trusteeship based on the alleged improper behavior of that local union in such strikes. The Court in Marketti properly found that there was confidential information transferred by the local union to the attorney in the strike litigation which was material to the trusteeship action brought by the international union. Again, it is impossible to find any parallel between Marketti and the instant case.

In NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976), attorney Randall, who had been house counsel for NCK, was subsequently retained by a former vice president of NCK, Bregman, to represent him in a litigation with NCK involving matters with which Randall was intimately familiar during his employment with NCK.

In Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975), a female attorney, Delulio, who during her employment with Celanese had defended Celanese in a discrimination action brought by one Joan Hull against Celanese, subsequently terminated her employment with Celanese and brought her own discrimination action against Celanese through the

same law firm representing Hull while the Hull action was pending. It is hard to find any reasonable connection between the facts in the Hull decision and the instant case. In fact, the authorities cited by Intervenors are even less apposite than those cited by Furth.

Furth, a member of the California bar, offers no decisions which would refute the authorities of Croce, Petty, Arden and Nichols, discussed in Utah Stars' opening brief at pages 21-23.* Intervenors (Intervenors' brief, p. 38), state that the Croce decision is "discredited", failing to acknowledge that that decision has been repeatedly followed in the state of California. The only authority which Intervenors suggest calls Croce into question is E.F. Hutton & Company v. Brown, 305 F. Supp. 371 (S.D. Texas 1969), which is clearly distinguishable on its face from the instant case and from Croce. In the Hutton case, the

---

* Cross-Claimant-Appellant does not contend that the facts in Croce, Petty, Arden and Nichols dictate the result in this case. However, they do assist the Court in reversing the Order below because while in those cases the courts permitted a counsel for multiple parties in a first action to subsequently represent one of the parties against the other in a second action involving issues common with the first action, here all the Utah Stars are asking is that the attorney who undertook to represent multiple parties, the ABA and its member teams including the Utah Stars, having a common interest against the NBA, should be permitted to complete his representation of the Utah Stars against the NBA in the antitrust action he began.

attorneys in question represented Hutton's employee at a prior SEC proceeding and later represented Hutton in its action against such employee for irregular activities by such employee which were under question in the earlier SEC proceeding. It is quite clear in that case that the attorneys were attempting to prosecute a former employee of Hutton which the corporation took in its confidence and tried to use to protect itself. In that situation, the employee is hardly ever on an equal position as a client, which is not the case in theory as regards the Utah Stars vis-a-vis the Intervenors. In Hutton, the attorneys were discharging inconsistent obligations from the outset of the first proceeding before the SEC. The attorneys were forced to take contrary positions on the same acts. This is not so in the instant case. In Hutton, the attorney-client relationship ceased as to the employee, Brown, in the prior proceeding, and thus a conflict arose in the second proceeding because that relationship of trust could not be ignored and was going to be used affirmatively against Brown if Hutton's counsel were not disqualified.

There was clearly a breach of a fiduciary obligation to Brown, the employee, in the Hutton case. There is no such breach in the instant case. It is clear that the Hutton case represents a special problem of corporate officer-corporation confidences, and is not a truly indepen-

dent representation of two separate parties. The Court in that case correctly recognized a basic unfairness to the employee-officer to have his employer prosecute him with the same attorneys who gained his confidence in the prior SEC proceeding.

The Court in the Hutton case makes the following appropriate statement, applicable to the instant case: the ethical standards for attorneys "must be formulated and construed in that way which will best protect the interests of clients and uphold the dignity of the legal profession" (305 F.Supp. at 395). The lay sense of justice will be offended if Furth is disqualified, stripping the Utah Stars of its counsel on the eve of trial to the strategic advantage of the NBA and the Intervenors which have indemnified the NBA. As the Court in Woods v. Covington County Bank, 537 F.2d 804, 819 (5th Cir. 1976) stated in reversing a disqualification of counsel:

> "Inasmuch as attempts to disqualify opposing counsel are becoming increasingly frequent, we cannot permit Canon 9 to be manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers."

Because of the expertise of Furth and his present familiarity with the facts in this complex case, depriving the Utah Stars of his counsel at this point will work a substantial hardship* on the Utah Stars and will provide the

---

* Such hardship is grounds for denying disqualification. See, W.T. Grant v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) and J.P. Foley & Co., Inc. v. Vanderbilt, 523 F. 2d 1357, 1359 (2d Cir. 1975).

NBA a "strategic advantage" by the Intervenors' manipulation of the Code of Professional Responsibility through assertion of a non-existent conflict of interest. Where, as here, it has been shown that no breach of confidential relationship by Furth exists and where the alleged basis for conflict has not been created by any act of Furth but by the independent acts of Intervenors without his consulation and advice, there can be no basis for Furth's withdrawal or his disqualification.

CONCLUSION

For all of the foregoing reasons, the Order of Judge Carter granting Furth's withdrawal should be reversed.

Respectfully submitted,

WATSON LEAVENWORTH KELTON & TAGGART
Special Counsel Appearing for
Cross-Claimant-Appellant, R. T.
Eckles, Trustee in Bankruptcy for
Mountain States Sports, Inc., d/b/a
Utah Stars
100 Park Avenue
New York, New York 10017
(212) 683-4221

OF COUNSEL:

Thomas V. Heyman
Maxim H. Waldbaum
100 Park Avenue
New York, New York 10017

Robert G. Pierce
Butler, Landrum, Pierce and Turner
720 Kipling, Suite 201
Lakewood, Colorado 80215

CERTIFICATE OF SERVICE

This will certify that copies of the foregoing "Reply Brief for Cross-Claimant-Appellant" and "Exhibits to Reply Brief for Cross-Claimant-Appellant" were served this 19th day of April, 1977, by hand upon Robert S. Carlson, Esq., Spengler, Carlson, Gubar, Churchill & Brodsky, 280 Park Avenue, New York, New York 10017, and Michael A. Cardozo, Esq., Proskauer, Rose, Goetz & Mendelsohn, 300 Park Avenue, New York, New York 10022, and by express mail upon Frederick P. Furth, Esq., Furth, Fahrner & Wong, Russ Building, Suite 1330, San Francisco, California 94104, and by prepaid mail upon:

Michael H. Goldberg, Esq.
American Basketball Association
15 Columbus Circle
New York, New York 10023

Irwin Warren, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Gene R. Kazlow, Esq.
Kazlow & Kazlow
10 East 40th Street
New York, New York 10016

Richard Phillips, Esq.
1622 Locust Street
Philadelphia, Pa. 19103

Alan C. Schwartz, Esq.
Schwartz, Halperin & Schreiber
285 Madison Avenue
New York, New York 10017

Hill, Betts & Nash
One World Trade Center
Suite 5215
New York, New York 10048

Sommer, Tinkham, Barnard,
Freiberger & Scopelitis
815 Merchants Bank Building
Indianapolis, Indiana 46204

Sidney Stein, Esq.
Paul, Weiss, Rifkind,
Wharton & Garrison
345 Park Avenue
New York, New York 10017

Douglas S. Draper, Esq.
Dodge, Friend, Wilson &
Spedale
1335 First National Bank
of Commerce Building
New Orleans, Louisiana 70112

Rembar, Wolf & Curtis
19 West 44th Street
New York, New York 10036

Boone, Schatzel, Hamrick & Knudsen
235 Montgomery Street,
Suite 420
San Francisco, Calif. 94104

Peter Flournoy, Esq.
O'Donnell & Flournoy
3681 Fifth Avenue
San Diego, California 92103

Stephen V. Bomse, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street
San Francisco, Calif. 94104

Herbert Solomon, Esq.
Rifkind, Sterlin & Solomon
1200 Third Avenue, Suite 1400
San Diego, California 92101

Dr. Leonard Bloom
110 West "C" Street, Suite 2200
San Diego, California 92101

Guy R. Friddell, III, Esq.
Willcox, Savage, Lawrence, Dickson & Spindle
Virginia National Bank Bldg.
Suite 1800
Norfolk, Virginia 23510

Frank M. Goldberg
1231 Camino Del Rio South
San Diego, California 92108

Van Cunningham
Stewart Sandwiches, Inc.
5732 Curlew Drive
Norfolk, Virginia 23502

Mr. R. T. Eckles
Trustee in Bankruptcy for Mountain States Sports, Inc.
2500 First of Denver Bldg.
Denver, Colorado 90202

William G. Todd